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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1973.

Docket No. 73-501

Ana María Rodríguez Seda
Petitioner

VS.

Dominica Barbosa et als.
Respondents.

PETITION FOR CERTIORARI TO THE SUPERIOR COURT OF PUERTO RICO MAYAGUEZ SECTION

José Sabater, Walter L. Newsom Jr.
Enrique Báez García
Attorneys for Petitioner
Box 398 — Mayaguez, Puerto Rico

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Petitioner Ana Maria Rodríguez Seda, widow of Pedro Barbosa, petitions this Supreme Court for a writ of Certiorari to review the judgment pronounced by Hon. Manuel J. Vera Mercado, Judge of the Superior Court of Mayagüez, Puerto Rico entered May 3rd., 1972 in the case filed in said Court, José Tirado known as José Barbosa, Plaintiff vs. The testamentary Succesion of Pedro Barbosa, constituted by his widow Ana Maria Rodríguez Seda, Defendant, Number CS 67-2088 civil, in the Superior Court, Number E. 72-149 Review Supreme Court of Puerto Rico. Action for filiation, Nullity of institution of testamentary heiress and partition of inheritance.

Due to the fact that the Supreme Court of Puerto Rico refused to review the judgment of the trial Court rendered by the Superior Court of Mayagüez, the Petitioner herein has to apply to this Supreme Court of the United States, requesting that the said judgment be reversed and that another correct judgment be rendered dismissing the complaint in this case.

The opinion and judgment of the trial court is set forth as APPENDIX (A).

JURISDICTION

According to law, appeal from judgments and decisions of the Supreme Court of Puerto Rico, can be filed in this Supreme Court of the United States. When Pedro Barbosa died he left as a part of his inheritance Certificates of Deposits of money in the local Banks to the total amount of $29,000.00. This is a portion of the inheritance left by decedant. But he also left real estate property situated at Mayagüez for a value of $30.000.00 or more.

Certificates of local Banks are set forth as APPENDIX (B).

STATEMENT OF FACTS AND ISSUES INVOLVED

FIRST: Pedro Barbosa made his last will and testament in a notarial public deed

according to the notarial law and the Civil Code of Puerto Rico. Such deed was numbered 147, dated August 4th., 1965 before Attorney at Law and Notary Public José Sabater, wherein the testator solemny stated that as he never had any children he was authorized by law to institute any one as his heir and therefore he instituted his wife as his sole and universal heiress.

SECOND: The testator died nearly two years (2) he made his las will and testament (July 25th., 1967) under his last will and testament herein before mentioned.

THIRD: José Tirado Alleging that he was also known as José Barbosa, about two months after testator's death, filed his complaint in the Superior Court of Mayagüez, alleging that Pedro Barbosa recognized him as his son and that as such son he was entitled to use his father's surname and to inherit him. The plaintiff further requested that decedent's las will and testament be decreed null and void and a partition of property be made.

FOURTH: Decedent's widow and testamentary heiress appeared in court and made opposition to plaintiff's complaint and filed her answer denying the essential facts of the complaint i. e. that the decedent never recognized the plaintiff as his son, that the plaintiff was an adulterous son and had no right, according to the law, to be recognized as a natural son.

FIFTH: A trial of the case was held before the Superior Court of Mayagüez, (June 19th, 1968) and after the trial came to an end, the attorneys for both parties submitted the case for decision to the Judge by means of written memoranda and thennthe Judge reserved his decision.

SIXTH: Pending the decision of the trial judge, the Plaintiff planned to submit himself to a chirurgical operation, but lest he would die, he made a private last will and testament in the City of New York where he resided, in accordance with the law of the State of New York and as he had no descendants, he named per-

sons which were no descendants of him, (these seven persons served him as witnesses in this case at bar) as legatees and instructed them, after his death, to get hold of decedent's inheritance.

SEVENTH: The Plaintiff submitted himself to said operation and died. After Plaintiff's death this peritioners allegeding in writing to the trial judge and discussed extensively, the following issues:

(a) That the trial Judge had lost jurisdiction over the person of the Plaintiff and over the subject matter of the action because of his death. Therefore the Judge had no power or authority to render judgment in favor or against a corpse (Article 25 of the Civil Code of Puerto Rico. Hernandez v. Hutchison, 20 D.P.R. 517. Article 25 prescribes: The juridical personality and capacity is extinguished by death; "Litigation has to be commenced by living persons". Bernabe v. Court 38 D.P.R. 723)

(b) That the Trial Judge had no power to approve as he did, the private last will and testament made by plaintiff in the City of New York and by doing so he usurped the authority bestowed by the law of New York on the Surrogate's Court, the exclusive Court to probate wills and testaments granted in the State of New York.

(c) That the legacy made by Plaintiff in favor of the seven persons to get hold of the alleged father's inheritance is a nullity ab initio because: the plaintiff-testator was not in possession of the inheritance; the donor has no power to donnate property he does not possess; at the time of granting plaintiff his last will and testament, the case had not been decided and there was not a judicial judgment recognizing the plaintiff as the son of decedent Pedro Barbosa.

EIGHTH: The seven persons designated by plaintiff in his last will and testament are named: 1. Dominica Barbosa; 2. Asunción Bar-

bosa; 3. Miguel Peña; 4. Tony Barbosa; 5. Carlos Barbosa; 6. Susana Tirado and 7. Ana Tirado.

The trial judge had not yet approved the last will and testament of the dead plaintiff, when he authorized these seven persons to substitute the dead plaintiff in order to prosecute the action as representatives of the plaintiff. This resolution, spite the opposition of the Petitioner, was a blunder because:

(a) He had a confusion between an heir and a legatee. The heir is a continuation of the personality of the decent, while a legatee does not represent the decedent. (José M. Manresa, Commentaries of the Spanish Civil Code, Vol. 5 p. 333)

(b) The civil status of filiation or paternity cannot be sold or transferred. The resolution of the trial judge appointing these seven legatees as substitutes of the dead plaintiff is equivalent to decide that decedent Pedro Barbosa at the time of his death left these seven persons as his children. The Plaintiff might

have named besides these legatees a Bank or a Hospital and consequently these institutions might also be considered as children of the decedent.

Copy of Plaintiff's last will and testament is set forth as APPENDIX (C)

(c) An action of filiation or paternity cannot be prosecuted by persons who are not descendants of the alleged son or daughter, (Decision of the Supreme Court of Spain, dated October 29th, 1928; June 15th, 1934; and June 27th, 1950) dead before judgment rendered in the case.

NINETH: About three years and a half after plaintiff's death, the trial judge rendered judgment deciding:

(a) That plaintiff although dead, was the son of Pedro Barbosa.

(b) That as such son, he was entitled to usedhis alleged father's surname and to inherit his estate.

(c) That decedent's last will and

testament was null and void and that a partition of the inheritance be made. Thereby, the widow of the testator (the Petitioner) was deprived of her testamentary inheritance without due process of law.

TENTH: The Petitioner finding that the judgment of the trial Court was obviously erroneos, filed before the Supreme Court of Puerto Rico a petition to review the decision of the court below. The Supreme Cour of Puerto Rico on May 31st, 1972 issued an order directing that a transcript of the oral evidence, and the documentary evidence be filed in said Court and besides allowed the defendant-recurrent to file a brief to sustain the petition for review. All of this was complied with. The attorney for the plaintiffs as substitutes of the original plaintiff, already dead, did not answer the brief of the recurrent now the Petitioner; BUT the Supreme Court of Puerto Rico ussued a resolution in October 1972, dismissing the case without findings or juridical reasons therefore.

The resolution was in three (3) words: "No ha lugar." (Dismissed).

According to the law of Puerto Rico, the Supreme Court cannot decide any case without stating the juridical reasons for such decision.

By law number 25 approved by the Legislature of Puerto Rico on June 9th, 1925, it is prescribed:

"At the final hearing of case, in a district Court the Judge thereof shall render and file at the time of the sentence a written opinion which shall state separately and briefly the facts he considers proved and his juridical reasons for his decision. When the finding of facts are based on conflicting evidence the judge shall state the reasons he may have for deciding the conflict as he did;

And in case of appeal, THE SUPREME COURT SHALL WEIGH SAID EVIDENCE AND DETERMINE IF THE FINDINGS WERE WARRANTED OR NOT." Therefore the Supreme Court of Puerto Rico cannot decide this case in the manner stated if that

law has to be resoected and complied with.

LEGISLATION OF EUROPEAN AND SPANISH AMERICAN NATIONS WHEN PLAINTIFF IN A CASE OF FILIATION DIES IN THE COURSE OF THE PROCEEDING BEFORE JUDGMENT.

ELEVENTH: In this Island of Puerto Rico there is no law prescribing who is the legal successor of the plaintiff in case of filiation, when the plaintiff dies during the proceeding and before judgment. The Spanish Civil Code did not foresee this situation and the Civil Code of Puerto Rico which is a copy of the Spanish, neither foresaw the said situation. As the Spanish Civil Code had no legislation on the matter, the Supreme Court of Spain decided to legislate and when such case came at bar decided that the forced heirs of the dead plaintiff could prosecute the case. The Supreme Court of Puerto Rico imitated the Supreme Court of Spain and also decided ahat the forced heirs or descendant of the dead plaintiff could prosecute the proceeding to the end, but never strange persons or persons who are not descendants would be allowed to continue the case.

Due to this lack of legislation, some

European and Spanish American Nations which adopted the Napoleonic Civil Code, approved legislation prescribing who were the successor of the dead plaintiff before judgment.

Article 213 of the Civil Code of Venezuela allows the dead plaintiff to be substitued by his descendants.

Article 271 of the Civil Code of ITALY, allows also the descendants to prosecute the case when plaintiff dies before judgment.

Article 363 of the Civil Code of BRAZIL, confers to file the complaint for filiation to the alleged son and if he dies before judgment, the right of action is extinguished.

Article 330 of the Civil Code of FRANCE, allows the descendants to continue and prosecute the action, PROVIDED the action has been already commenced or filed in Court and plaintiff dies before judgment.

Article 307 of the Civil Code of Switzerland allows the substitution either by his mother or his son.

Article 359 in conjunction with article 325 of the Civil Code of Argentine allows in case of death of the plaintiff before judgment to substitued by his son. If he has no son (as in the case at bar) the right of action is extinguished.

• • •

This legislation adopted by said nations shows a logical and juridical reasoning in cases of filiation when the unexpected happened: the death of the Plaintiff. And this legislation shows furthermore that it is an absurdity the decision of the trial judge substituting the dead plaintiff by the seven legatees named in the last will and testament of the plaintiff, who are not plaintiff's descendants. Such absurdity should be corrected for the sake of justice, legal science and jurisprudence. This is one of many absurdities that the Supreme Court of Puerto Rico despising the law, refused to review and decide.

VIOLATIONS OF THE CONSTITUTIONAL RIGHTS OF THE PETITIONER

TWELVETH: The Petitioner, AS WIFE of decedent Pedro Barbosa has the right of ownership of HALF of the Estate of her husband and also AS WIDOW of decedent she has the right of USUFRUCT on the other half, according to the Civil Code of Puerto Rico. Besides such vested rights her husband in his last will and testament instituted her as his sole and universal heiress. She is in possesion of the Estate as wife and widow.

Now, if the judgment of the trial judge would prevail, she would be deprived of her inherited property without due process of law. There is no process of law for the following reasons:

(a) Article 125 of the Civil Code of Puerto Rico provides: That the father is obliged to recognize HIS SON... BUT NO BODY ELSE. If there is NO SON, or the alleged son has died

before judgment recognizing him as son, then the right of action is extinguished. The Code never foresaw this situation, that of the death before judgment, therefore the provision of the Code is clear and without doubt, that in that case there was nothing else to do. As there is no law in case of death before judgment, the Courts have no authority to make a law to supply what the Code, - to their opinion - should be done and which the Code did NOT order or indicate to do. The Supreme Court of Spain when such question was submitted, as there was no legislation, decided - without authority - to allow the forced heirs, to prosecute the case to the end. The Civil Code of Puerto Rico is a copy of the Spanish Civil Code and the Supreme Court of Puerto Rico, repondent in this proceeding, committed the same error as the Supreme Court of Spain by imitating the decision of that Supreme Court. Let us call the attention of this Court that the trial judge in this case went beyond the decisions of both Supreme Courts, he decided

that the case can be continued by legatees (not heirs) who are no descendants of the original dead plaintiff; and substituted these seven persons in the place of the original plaintiff.

In California jurisprudence, Vol. V, p. 617, it is stated: "No Court in its effort to save a law, can properly pervert or destroy its plain meaning and so, making it express that which the legislature itself did not declare. This would be making a law. The decision of the trial judge in this part of the case menas that the protection of Petitioner's property by the Federal Constitution, was wiped out.

It is true that the Supreme Court of Spain is not bound by the Constitution of the United States, but the Supreme Court of Puerto Rico is obliged to uphold and maintain the provisions of the Federal Constitution. The only theory to accept the decision of the trial judge in this particular of the decision, would be, that the Civil Code of Puerto Rico on this point would be UNCONSTITUTIONAL but it is NOT, because to pres-

cribe that a "father is obliged to recognize his son" is not unconstitutional because the Code did not add that in case of death his grand children would be able to prosecute the action. Nevertheless, it is unconstitutional the excercise of the power of the Court to extend or add to the Code something else that the legislature did not add.

THIRTEENTH: We alleged to the trial Judge that he had no jurisdiction to probate the will of the original plaintiff that such authority is exclusive of the Surrogate's Court. Besides that we alleged that there was undue influence when the will was granted because during the time the will was prepared, the testator's mistress with whom the testator had ilicit relations, was all the time together with testator and influenced him to grant the will. The trial judge did not pay any attention to our opposition and approved the will.

Copy of that will is set forth as APPENDIX (D)

That will was null and void because:

(a) Testator ordered those seven persons to get hold of Pedro Barbosa's inheritance. At that time, there was no judgment recognizing him as Pedro Barbosa's son; he was neither in possession of the Estate. The widow was in possession.

(b) Testator could not sell or transfer or donnate his civil status of natural son.

(c) That will was never probated by the Surrogate Court of New York, wherein the testatr had his domicile.

(Ruling Case Law, Vol. 28, p. 370- "The general Rule is that original jurisdiction to probate a will rests in the Probate Court of the county of the dimicile of the testator at the time of his death, the probate Court of the domicile of the testator has exclusive jurisdiction".

(Leonard's Estate. 100, NYS - 2nd. 105 - In re Wach's man Estate, 238, NYS 2nd. 112. In re: Rotharcha's Estate, 29 NYS 181.)

Probate's proceeding is a special proceeding and has to be complied with. All witnesses in a

will have to appear before the Court and they did not. The Court must be satisfied of the result of the investigation.

C O N C L U S I O N

It is requested that the Petition be granted,

Respectfully submitted.

José Sabater and
Enrique Baez Garcia
Counsels for Petitioner

BY: Jose Sabater
One of the Attorneys

P.O. Box 398, Mayagüez
Puerto Rico 00708

APPENDIX (A)

IN THE SUPERIOR COURT OF PUERTO RICO
MAYAGUEZ SECTION

JOSE TIRADO, KNOWN AS JOSE BARBOSA, SUBSTITUTED BY HIS TESTAMENTARY SUCCESSION, COMPOSED BY DOMINICA BARBOSA, ASUNCION BARBOSA, MIGUEL PEÑA BARBOSA, MIGUEL PEÑA BARBOSA, TONY BARBOSA, CARLOS BARBOSA, SUSANA TIRADO AND ANA TIRADO	"	CIVIL NO. CS 67-2088
Plaintiffs	"	ON FILIATION, NULLITY OF INSTITUTION OF INHERITANCE AND PARTITION OF A SUCCESSION
Vs.	"	
THE TESTAMENTARY SUCCESSION OF MR. PEDRO BARBOSA, COMPOSED BY HIS WIDOW MRS. ANA MARIA RODRIGUEZ SEDA	"	
Defendant	"	

CONCLUSIONS AND JUDGMENT

José Tirado, known as José Barbosa filed before this Court on September 12, 1967, a complaint of Filiation, Nullity of Institution of Inheritance and Partition of a Succession against the Testamentary Succession of Mr. Pedro Barbosa Báez, composed by his widow, Mrs. Ana María Rodríguez-

Seda.

The plaintiff claimed that he was born in this city of Mayagüez on November 21, 1906 and was the son of Mrs. Pilar Tirado and Mr. Pedro Barbosa Báez on account of the love relations between his mother and the said Mr. Pedro Barbosa Báez. He also claimed, that while his parents were single and could get married, they lived in public concubinage in this city before the conception, during the pregnancy, during and after the birth of the plaintiff; and that the father of the plaintiff considered the plaintiff as his son all the time, accepting his paternity and the plaintiff considered himself since he was born a natural son of Mr. Pedro Barbosa Báez, who treated him public and privately as his son, calling and treating him as such, and making publicly that the plaintiff was his son and having established father and son relations.

The plaintiff also claimed that the relatives of his father always had the plaintiff as

a member of the family and son of Mr. Pedro Barbosa Báez and that Mr. Pedro Barbosa Báez died in San Germán, Puerto Rico, on July 29, 1969, being Mayagüez his last domicile, and that at the time of his death was married to Mrs. Ana María Rodríguez Seda, his widow, and that at the time of his death the said Pedro Barbosa Báez had no ascendant relatives of any kind nor other descendants, with the exception of his only son, the plaintiff in this case; and that the other heiress was the widow on the usufructuary portion of surviving spouse determined by law.

The plaintiff also claimed, that Mr. Pedro Barbosa Báez executed a will in Mayagüez on August 4, 1965 before Notary Public José Sabater by deed number 147 on open will, in which after he erroneously declared that he had no son whatsoever, he named as his sole and universal heiress, his wife, Mrs. Ana María Rodríguez Seda, whom he also appointed as his testamentary executrix; and finally the plaintiff claimed that as he had been omitted from

the will, the nullity of institution of inheritance was justified and it was in order the filing of the corresponding declaration of heirship of the deceased and then the partition of the decendent's assets.

In its consecuences the plaintiff requested the Court fo pronounce Judgment declaring him son of the deceased Pedro Barbosa Báez, with all his inherent rights as such and resolve the nullity of institution of inheritance in favor of the widow of the deceased in day certain to proceed to the partition of the estate of the plaintiff's deceased father.

The defendant answered the complaint on October 31, 1967 denying that the plaintiff was the son of the deceased Pedro Barbosa and that he had engendered the plaintiff, also denying that Mr. Pedro Barbosa had lived in concubinage with the mother of the plaintiff at any time; and also denied that there were any relations whatsoever of father and son between the deceased and the plaintiff; and claimed that the plaintiff

had lived almost all his life in New York and the deceased in Puerto Rico.

The defendant denied that relatives of his deceased husband had recognized the plaintiff as son of Pedro Barbosa; but claimed that some of the relatives of the deceased were in bad terms with her due to the fact that the deceased instituted her as the sole and universal heiress by means of a will executed by him before Notary Public Sabater, frustrating in that way the hope of said relatives to participate in the inheritance of Pedro Barbosa, who claimed, never had sons nor descendants.

The defendant accepted the execution of the will before Notary Public Sabater, but claimed that the testator could not institute her as his only heiress because he had no ascendants nor descendants of any kind and denied that the plaintiff had been omitted in the will because said plaintiff had no right to inherit the testator because he was not his son; for not existing any written statement where don Pedro had

recognized the plaintiff as his son, and in the contrary, the testator declared in his will that he had no sons or descendants.

This case went to trial during June 19 and 20, 1968 appearing the parties personally and their respective attorneys representing them. At the beginning of the trial the defendant notified the plaintiff in Court with an Ammended Answer to the Complaint in which was specified that Mr. Pedro Barbosa Báez was married to Mrs. Cristina Santiago in this city on September 23, 1903 and that said marriage was dissolved on February 14, 1911 by a Divorce Judgment pronounced by the District Court of Mayagüez. To the Ammended Answer was attached a certified copy of the Certificate of Marriage between Mr. Pedro Barbosa and Mrs. Cristina Santiago. After the oral and documental evidence was submitted by both parties, the Court granted time to both parties to file a Memorandum on behalf of their respective contentions.

Filed by each party their respective Memo-

randum, the case was submitted to the consideration of this Court, but on November 18, 1968 the defendant filed a motion asking the Court to rule the definite dismissal of the lawsuit due to the fact that the plaintiff had died in New York in September of said year, and according to the defendant's judgment, this being a personal action of filiation, said cause was extinguished with the death of the plaintiff as he left no sons or descendants.

The hearing of the Motion to Dismiss was set for December 11, 1968 appearing the parties by their respective attorneys and after the discussion of the same, the Court denied it and granted the plaintiff party a period of 15 days to file a motion of substitution of plaintiff; and on December 19, 1968, Dominica Barbosa, Asunción Barbosa, Miguel Peña, Tony Barbosa, Carlos Barbosa, Susana Tirado and Ana Tirado filed a motion, according with the provisions of Rule 22.1(a) Civil Procedure, requesting the original plaintiff be substituted by them

because said plaintiff had died in New York on October 3, 1968 after having executed a will in New York on September 19, 1968 by which he designated them as his sole heirs as to his interest in this lawsuit and they claimed that besides being testamentary heirs of the plaintiff, the ladies by the surname of Tirado were the legal heirs of the plaintiff, that is, the sisters of the mother of said plaintiff and that the ladies Dominica and Asunción Barbosa were the sisters of double relationship of the deceased Pedro Barbosa, constituent of the defendant.

To the motion on substitution of parties the defendant was opposed by written statement and the Court set a hearing on February 10, 1969 for discussion of said motion of substitution of parties and the objection of the same. After a thoroughly discussion of the matters brought by the parties, the Court reserved his resolution and on April 1, 1969 pronounced judgment in favor of the motion on substitution of the plaintiff party accepting as plaintiffs the seven

persons designated by the plaintiff in his will that had been presented and admitted in evidence during the hearing of the defendant's motion asking for the dismissal of the lawsuit.

On April 8, 1969, the defendant filed a Motion asking that the Resolution of the Court ordering the substitution of the plaintiff party be reconsidered and pending of Resolution said Motion, the plaintiffs files a motion on June 18, 1969 asking the court to declare valid the will executed in New York by the original plaintiff and to order the protocolization of the same in a lawyer's office in Mayagüez. The Court set October 28, 1969 for the final hearing for the discussion of said motion of substituting plaintiffs and in said hearing plentiful evidence was submitted by the substituting plaintiffs on the execution of the will and the validity and legitimacy of the same. That same day was also filed the Motion of Reconsideration of the defendant April 8, 1969 which was resolved in Resolution in this day separately. Both par-

ties presented their respectives memoranda on behalf of their respective contentions and the Court reserved its resolution, until today, in which declare the followings:

DETERMINATION OF FACTS

1. The original plaintiff José Tirado, known as José Barbosa, was born in this city of Mayaguez on November 21, 1906 and his birth was the product of love and sexual relations between the mother of the original plaintiff, Mrs. Pilar Tirado and the constituent of the defendant, Mr. Pedro Barbosa Báez.

2. At the time of the conception, during the pregnancy of the plaintiff's mother and the birth of this last one, Mrs. Pilar Tirado was a single woman and Mr. Pedro Barbosa, the father of the original plaintiff, was married with his first wife, Mrs. Cristina Santiago, whom he had married in Mayagüez on September 23, 1903.

3. Nevertheless being Mr. Pedro Barbosa married at the time of the conception, during the

pregnancy of the mother of the plaintiff and his birth, it was satisfactorily proved to the Court that he lived during all said time in public concubinage with the mother of the original plaintiff at her house and at her sisters' at Barrio Sábalos of Mayagüez, a place known as Carrau. The mother of the original plaintiff lived during that time in front where the sisters of the deceased Pedro Barbosa, who declared during the trial in favor of their nephew, the plaintiff José Barbosa.

4. Some years after the birth of the plaintiff, his mother went to the United States where she lived nearly thirty years and then died. The plaintiff stayed in Puerto Rico with his maternal relatives until he was seventeen years old when he also went to the United States. During those seventeen years of his life, his father Mr. Pedro Barbosa, as well as his paternal aunts and other relatives of Mr. Pedro Barbosa had and considered the plaintiff as son of the deceased and a carnal nephew of the sisters of the father.

5. The original plaintiff made some trips to Puerto Rico and he visited his father at his house and in those visits they had relations as father and son and other younger relatives of Mr. Pedro Barbosa, as his nephews, sons of the Barbosa sisters and other cousins of Mr. Pedro Barbosa, as Mr. Carlos and Mr. Antonio "Tony" Barbosa, considered and treated the plaintiff as a relative to them and a son of Mr. Pedro Barbosa.

6. It was established by the evidence not only the alledged concubinage but also was proved to the entire satisfaction of the Court the status of natural son of the plaintiff and above all, it was proved, without doubt, the alledged paternity in the complaint.

7. Mr. Pedro Barbosa Báez executed in this city of Mayagüez on August 4, 1965 before Notary Public José Sabater an open will where he erroneously declared that he had no son nor descendants whatsoever and instituted as his sole heir of all his estate, his last wife, the defendant in this case, Mrs. Ana Maria Rodríguez

Seda, whom he also designated as his testamentary executrix. From the evidence presented it does not appear that said will have been revoked or ammended in anyway.

8. After the trial was celebrated and while the same was pending on study by the Court, the original plaintiff died in the city of New York on October 3, 1968, where he lived, having executed a will according to the laws of the State of New York on September 19, 1968 which was prepared by the Notary Public of New York, Milton G. Tunick, who signed said will as a witness together with two other instrumental witnesses named Marie Martin and Julia Bass, having the three witnesses certified that the testator Joseph Barbosa executed and signed said will in the presence of them.

9. By said will the original plaintiff designated as his heirs or beneficiaries of any property, interests or estates that he could obtain in the event of winning the lawsuit of filiation against the Succession of his

father, by equal parts, the seven substituting plaintiff in this case, that are, his two paternal aunts, sisters of his father, Dominica and Asunción Barbosa, his cousin, Miguel Peña Barbosa, his paternal cousins, Tony and Carlos Barbosa and his two carnal aunts on his mother's side, Susana and Ana Tirado.

10. The original plaintiff José Barbosa left no estate whatsoever in New York and only left debts that were paid by Isabel Tirado, the executrix appointed in the will executed by him.

In view of the determinations of facts above mentioned, the Court reaches the following:

CONCLUSIONS OF LAW

1. José Barbosa, the original plaintiff in this case was born on 1903 when Article 187 of the Civil Code or Puerto Rico of 1902 was in effect. Said Article provided then that "The illegitimate son could be recognized in any way by the father and the mother jointly or by only one of them" and the compulsory recognizance of the illegitimate sons born within the pe-

riod of 1902 to 1911 was regulated by Articles 188 and 189 of said Code of 1902. Said Article 188 provided that the illegitimate sons, as they were then known, that is, all the sons out of weklock, could prove their paternal or maternal filiation; that is, the said Article allows in an unequivacle way, the investigation of the paternity, this being, as we know, prohibited under the rgimen of the Spanish Code. Article 189 of the Civil Code of 1902 provided that "The father was obliged to recognize the illegitimate son in the following cases:

a. When an undoubtful written statement exists where he expressly recognize his paternity.

b. When public or privately he had him for a son or have called him in conversation as such or support him or pay for his education.

c. When the mother was known as living in concubinage with the father at the time of the pregnancy or birth of the son or when he was born during the time their parents were having

lover relations.

This Article 189 changed considerably the contents of the old Article 135 of the Civil Spanish Code. The first subsection remained the same, but in the second one the old concept of the continued possession of status of natural son was dissolved, weaken. In this way. after 1902, only one of the compromises elements of the possession status, as was understood in the former period, was enough so that the illegitimate son could demand his unavoidable acknowledgement. For example, the act of the father to call him publicly a son or to support him and pay for his education was enough to proceed to seek the filiation action.

In Orana et al v. Oyanguren, 19 D.P.R. (1913), the Supreme Court of Puerto Rico decided that it could not be judged as insufficient evidence presented in a filiation lawsuit under paragraph 2 of Article 189, for the mere fact that if evidence was presented to demostrate the support of the sons by the father, but no evidence

was presented to prove that the father was paying for his education, especially if the evidence of recognizance executed by the father was enough to establish said recognizance.

In Alicea v. Antuñano, 50 D.P.R. 930 (1937), it was resolved that if it was proved that at the time of the conception of the son, the mother was the concubine of the putative father and that he had shown his love for his son once in a while, said acts were enough proof to declare the plaintiff a recognized natural son of the defendant. It is added in this case that under the legislation of 1902 it was not necessary to prove the continuous possession status of natural son".

The Article 180 of the Civil Code of 1902 reads as follows:

> "The sons are legitimates, or illegitimates, or legitimated."
>
> "Legitimate sons are the ones born after the marriage is consumated."
>
> "Illegitimate sons are the ones born out of wedlock."

"The illegitimate sons could be legitimated, either by the marriage of the parents or according to the rule of this Code."

It was on March 9, 1911, that the Legislative Assembly of Puerto Rico approved Law No. 73 ammending articles from 187 to 197 of the Civil Code of 1902. And on account of that law itwas retracted to the Spanish system to the effect of making the difference between natural sons, adulterine sons, etc. and that it was established again the requisite that the parents of the son could get married in order that said son could be declare as a recognized natural son. The Article 193 of the Civil Code of 1902 was ammended by Law 73 of 1911 to read as follows:

"Art. 193. Natural sons are the ones born out of wedlock, of parents that at the time of the conception could get married without or with despensation."

Not being a requisite that the parents of the plaintiff could get married at the time of the conception and the birth of the pliantiff, it is clear the mere fact that the father of the plain-

tiff had been married to another women when he lived in concubinage with the mother of the plantiff and procreated with her said plaintiff could not prevent that the plaintiff be declared son of his father with all the rights granted by law. The situation could have been different if the plaintiff had been born after 1911 and before 1942, if the father had been married to another woman, because, as we have stated, it was in 1911 that it was established by law that in order that a son could suit his father in a lawsuit filiation he had to prove that both the father and the mother could get married with or without dispense. That is, the adulterine son born between 1911 and 1942 could not demand filiation before the Courts. But there is more, since our Constitution was approved in 1952 and Law number 17 of the same year, even the adulterine sons born between 1911 and 1942 and all the other adulterine sons have the right to suit for filiation during the life of his parents or a year after the death of either one, and as to obtain-

ing the same equal rights as the ligitimate sons, including the right to inherit the parents, the jurisprudence is clear and conclusive to the effect that the applicable law is the one that rules at the time of the death of the father and that if said death occurs, like in this case, after the year 1952, the son has the right to demand judicially his recognizance as a son within one year after the death of the deceased father. In this case the father of the plaintiff died on July 29, 1967 and the complaint was filed on September 12 of the same year. Ocasio vs. Díaz 83 D.P.R. 676.

2. Our Constitution established conslusively that "all men are equal before the law. Prejudice could not be established on account of race, color, sex, birth, origin or social condition, nor political or religious ideas. Either the laws or the public education system will impress these principles of essential human equality." The law number 17 of August 20, 1952 provided that:

"All sons have respect to their parents and the estates of their father the same rights that belong to the ligitimate sons."

After such clear precepts of our Constitution and the quoted law, it could not be sustained by the defendant that, for the fact that the father of the plaintiff was married to another woman when he lived in concubinate with the mother of the plaintiff and procreated the plaintiff, the plaintiff has not the same rights that might have any legitimate son of the deceased Mr. Pedro Barbosa.

In the case of Ocasio vs. Díaz, supra, it was established by our Supreme Court that "All court decree concerning the status of the son will be established by the verification of the fact of the natural or biological paternity, no matter the date or any other circumstances of the birth, being enough that said paternity be proved satisfactorily under the usual procedures of evidence according with the preponderance of the evidence and according to conclusions that, taking into consideration the concurrent circums-

tances in the case, represent the more rational, equitable and legal balance in the resolution of the case.

The rules or requisites of the evidence appointed in Article 125 of the Civil Code, ed. of 1930, 31 L.P.R.A. sec. 504, will not be applied in any lawsuit or procedure of filiation in court proceedings or in process.

3. The Article 742 of the Civil Code of Puerto Rico, ed. of 1930, 31 (7A) L.P.R.A., 2368 provides that:

> "The omission of one or of all the forced heirs in straight line, whether they live when the will was executed or that they were born after the testator died, will null the institution of the heir; but will prevail the offer and improvements when they are not innofficious."

In the subject case, the testator did not provide offers or improvements of any kind, for which the institution of inheritance made by the testator in favor of his last wife and today his widow, is pronounced by the Court nulled in all its parts, due to the fact that the testator

omitted his forced heir in straight line that was his son José Barbosa, the original plaintiff in this case. Iturrino vs. Iturrino, 24 D.P.R., 467; Garrastazu vs. Registrador, 36 D.P.R. 177; Semidey vs. Vigueira, 53 D.P.R. 467; Sosa vs. Sosa, 66 D.P.R. 606; Ortiz vs. Bermúdez, 70 D. P.R. 707; Valladares de Sabater vs. Rivera Lazú, 89 D.P.R. 254.

4. The jurisprudence of our Supreme Court is clear to the effect that: "Brought a lawsuit on filiation, the death of the plaintiff will not produce the caducity of the petition. The lawsuit could be continued by the heirs: Gastón vs. Herederos de Francheschi, 43 D.P.R. 300 and Silva vs. Doe, 75 D.P.R. 209. The"maxima actio personalis moritur cum persona" will not prevail in the civil right.

It is inconsistent with the fundamental principle of that right that sustain that the heir is the continuing legal person of the deceased. Silva vs. Doe, Supra.

5. Rule 22.1(a) of Civil Procedure

provedes that:

> "If a party dies and the claim is not extinguished on account of that, the Court, at a request files within the two years after the death, will order its substitution by the appropiate party." And the same Rule provides as follows:
>
> "The substitution claim could filed by the successors or representatives of the deceased or any of the parties..."

In this case the substitution was requested by the testamentary heirs of the original plaintiff, two of them who were his maternal aunts, and two the paternal aunts and the other three, cousins by the side of the father.

As the plaintiff at the time of his death had no ascendants or descendants, nor a living wife, nor brothers, his aunts and cousins were within the grades recognized by the law to become forced heirs of the deceased, so that they could request the substitution of the plaintiff by them, even when there would have not existed a valid will executed by the original plaintiff.

6. It is good to make clear that the defendants does not object the will executed in-

New York because it is fictious, fraudulent or obtained by threats, fraud or dolus, or because its dispositions are contrary to the moral or the laws of Puerto Rico, Its impugnation is based in the fact that, according to the defendant's judgment, the will was not executed with the necessary formalities and that the same was not probated in New York. The Court has read in the plaintiff's memorandum the requisites demanded by Section 21 of Article II of Decedent Estate Law of New York, as it appears in 13 McKinney's Consolidated Law of New York Annotated and finds that the will was executed in compliance with the requisites of the law of said State. Besides, the evidence of the plaintiffs established that the will was prepared by a lawyer of that State, and that said lawyer signed the same as a witness of its execution. The New York jurisprudence says that when a will is executed under the supervision of a lawyer, it is presumed that all the formalities required by law were fulfilled. In re Surak's Will 1944, 48 N.Y.S. 2d. 400.

Also, it has been resolved besides in said State that if a lawyer signs the will as a witness that fact gives persuasive force to the inference expressed in the "attestation clause", to the effect that all legal formalities required were fulfilled. In re Tisher's Will, 1956, 155 N.Y.S. 2d. 827.

Not having left the testator any property in New York, it did not fulfill any practical end to "probate" the will in that State. In re Mayer 145 N.Y.S., 665.

The question involved in this case over validity of will executed in New York according to the laws of that State and the protocolization of the same in Puerto Rico, is not knew in this jurisdiction. In the case of Armstrong vs. Armstrong, 85 D.P.R. 404, our Supreme Court, when declaring the validity of a will that was executed in New York in 1934 by Mrs. Emilia Villaronga, widow of Armstrong, born in Puerto Rico and a resident in New York, and which will was protocolized in a notary's office in Ponce,

Puerto Rico by order to that effect by the Superior Court of Puerto Rico, Ponce Section in proceedings on protocolization of will, said Court expressed as follows after quoting Article 2 of Decedent Estate Law, in 13 McKinney's Consolidated Laws of New York Annotated, Secs. 10-48:

> "The Civil Code is an armonic legal body that requires to be read jointly. Its dispositions cannot be interpreted separately."
>
> "The citizens of Puerto Rico can make a will in a foreign country, observing the forms established by laws of the country where they are."
>
> "The law in force in Puerto Rico as to the formalities of the judicial acts executed in a foreign country, as a general rule, is in Art. 11 of our Civil Code-- the forms and solemnities of the constracts, wills and other public instruments, are enforced by the laws of the country in which they are executed-- and said rule is known as "lex loci actus and also as locus regist actums."
>
> "It is not necessary in Puerto Rico that a will executed in a foreing country meets the formal requisites demanded by our law even when said will will trasmit inmovable estate located in that country. (Colón et al v. Registrador 24, 753; Pastor v. Miró, 52 and Melón v. Entidad de Provincia Religiosa 189 F. 2d. 163 reexamined)."

J U D G M E N T

In view of the determinations of fact and conclusions of law above mentioned, Judgment is pronounced in this case providing and declaring that:

1. José Barbosa was the son of the deceased Pedro Barbosa Báez and Mrs. Pilar Tirado, and as such son of the deceased Pedro Barbosa he had the right to use his father's surname and to inherit him as if he were his legitimate son.

2. That the institution of inheritance made by Mr. Pedro Barbosa in his open will executed by public deed number 147 in this city on August 4, 1965 before public notary José Sabater is null and has no value for having been omitted in said will the son of the testator and original plaintiff in this case, José Barbosa Tirado.

3. Declaring valid the will executed in the city of New York by the deceased José Bar-

bosa on September 19, 1968 in which he designated as his testamentary heirs as to his right and interest in this lawsuit his paternal aunts, Dominica and Asunción Barbosa, his maternal aunts, Susana and Ana Tirado, and his cousins Antonio (Tony) Barbosa, Miguel Peña Barbosa and Carlos Barbosa. As of this date and in a separate Resolution we are ordering the protocolization of said will in a lawyer's office of Mayagüez in order that the substituting plaintiffs could exercise their rights at their convenience and according to the laws in force

4. The defendants is sentenced to pay Court costs and the expenses of this lawsuit.

Register and Notify.

Mayagüez, Puerto Rico, this 3rd. day of May, 1972.

(Sgnd.) Manuel J. Vera Mercado
Superior Court

CERTIFY:

(Sgnd.) Arsenio Ruiz
Secretary

APPENDIX (D)

CERTIFICADO DE AHORROS A PLAZO FIJO

Banco Crédito y Ahorro Ponceño

OFICINA DE MAYAGUEZ PUERTO RICO

$10,000.00 15 de NOVIEMBRE de 19 66 Núm. 12853

Don PEDRO BARBOSA BAEZ ha depositado en esta fecha en la Oficina de este Banco en MAYAGUEZ P. R. la cantidad de B.C.Y.A.P. 10000 DOLS 00 CTS ($ 10,000.00) U. S. Cy.

pagadera dicha cantidad al depositante o a su cesionario, en la fecha de vencimiento indicada, mediante la entrega de este certificado debidamente endosado. Este depósito devengará intereses al [illegible] por ciento ([illegible] %) anual pagaderos trimestralmente y hasta la fecha de vencimiento. Este depósito estará sujeto a los términos y condiciones estipulados al dorso.

VENCIMIENTO: 15 de MAYO de 19 67

Firma Autorizada

Lazzarini

I, Wilfred Vasquez do hereby certify that I am the Manager of Bank Crédito and Ahorro Ponceño (Mayaguez Branch office) and that according to our Books the deceased Pedro Barbosa made the deposit of money evidenced by the above certificate, Mayaguez, Puerto Rico, June 1st, 1973.

Signed:

Manager

Affidavit Num. 184

Subscribed before me by Mr. Wilfred Vasquez Lazzarini manager of the Banco Crédito & Ahorro Ponceño, of lawful age and resident of this [illegible] personally known, at Mayaguez, P.R. June 1st. 1973.-

Attorney at law and notary Public
My commission is perpetual according to law.

CERTIFICATE OF DEPOSIT
NOT NEGOTIABLE

Plaza de Colón
Mayaguez Puerto Rico September 8, 1965

No. 3979

THIS CERTIFIES THAT THERE HAS BEEN DEPOSITED IN

THE FIRST NATIONAL CITY BANK OF NEW YORK

the sum of FNCB P.C.-MAY. $19000 AND 00 CTS Dollars

payable 90 DAYS after date to MR. PEDRO BARBOSA or assigns with interest at the annual rate of 4 per cent upon return of this certificate properly endorsed. No interest will be paid upon the amount of this certificate after the date of its maturity

THIS CERTIFICATE IS ASSIGNABLE ONLY ON THE BOOKS OF THE BANK

$19,000.00 Ana Cuevas
AUTHORIZED ACCOUNTANT

[redacted], Ramirez

[redacted] hereby certify that I am the Manager of the [redacted] Bank of New York, (Mayaguez Branch Office) and that according to our books [redacted] Pedro Barbosa was the deposit of money evidenced by the above certificate[redacted] Mayaguez, Puerto Rico, June 1st, 1973.

Signed L.E. Ramirez
Manager

Affidavit Num 185

Subscribed before me by Ramon L. Ramirez, of lawful age, manager of the First National City Bank, Mayaguez Branch, and resident of this city to me personally known, at Mayaguez, Puerto Rico, June 1st. 1973.

Attorney at law and notary Public. My commission is permanent according to law.

APPENDIX (C)

"LAST WILL AND TESTAMENT OF JOSEPH BARBOSA.---- I, JOSEPH BARBOSA, residing in the County of the Bronx, City and State of New York, and being of sound and disposing mind and memory, do hereby, make, publish and declare this to be my Last Will and Testament, hereby revoking any and all Wills and Codicils heretofore made by me.

FIRST: I direct that all my just debts and funeral expenses be paid as soon as possible from my Estate.

SECOND: I direct that I be interred in the same grave as my wife, Providencia, in Woddlawn Cementery, Bronx, New York, and that a suitable monument be erected over my grave.

THIRD: In the event that I am successful in a law suit presently pending in the Supreme Court in Mayagüez, Puerto Rico, which involves the Estate of my late father, PEDRO BARBOSA, I hereby devise and bequeath all of the said money or property that I may receive for said

Estate or litigation into:

DOMINICA BARBOSA
ASUNCION BARBOSA
MIGUEL PEÑA
TONY BARBOSA
CARLOS BARBOSA
SUSANA TIRADO
ANA TIRADO

In equal shares, share and share alike. In the event any of such persons predecease me, I hereby devise and bequeath the share or shares that he or she would have received, if living, unto his or her ussue. In the event that any of said persons predecease me without issue, then the share or shares he or she would have received had he or she survived me, I hereby devise and bequeath to the survivors of the above names persons in equal shares.

FOURTH: All the rest, residue and remainder of my property, both real and personal, of every kind and nature, wheresoever situated, I hereby devise and bequeath unto ISABELLE TIRADO, also known as ISABELLE TIRADO BARBOSA.

FIFTH: I hereby nominate and appoint ISABELLE TIRADO BARBOSA, to be the Executrix of this my

Last Will and Testament and direct that no bond be required of her for the faithful performance of her duties, as such Executrix.

SIXTH: (a) I hereby authorize and empower my Executrix in her discretion, to sell and dispose of, either at public auction, or at private sale, at such prices and upon such terms and conditions as she may deem best, any and all real or personal property, of which I shall die seized and possessed of, and in respect to any and all of my said real estate, to make, execute, acknowledge and deliver, good and sufficient deeds of conveyance for the same.

(b) I hereby authorize and empower my Executrix or her successor to fix and determine the valuations of any and all property of my Estate for the purpose of a division of my Estate.

(c) I further authorize and empower my said Executrix or her successor, in her discretion, to retain any of my property in the same form of investment in which it may be at the time of my death, without being limited to the investments

provided by law for trust funds.

IN WITNESS WHEREOF, I have hereunto subscribed my hand and affixed my hand and seal to this, my Last Will and Testament, the 19th day of September, 1968

(Firmado) JOSEPH BARBOSA L.S.

(Fdos.) Marie Martin
Julia Bass
Milton G. Tunick

The foregoing instrument was subscribed by the above named Testator, JOSEPH BARBOSA, in the Borough of the Bronx, City and State of New York, on the 19th day of September, 1968, in our presence and in the presence of each other, and was at the same time and place published and declared by said Testator, JOSEPH BARBOSA, to be his Last Will and Testament, and thereupon, we, at the request of said Testator, and in his presence, and in the presence of each other, did subscribe our names as attesting witnesses thereto the date and year last above written.

(Firmados): Marie Martin-residing at 1932 O'Brien Ave. Bx Ny.
Julia Bass-residing at 2470 University Ave., Bx Ny.
Milton G. Tunick-residing at 800 Grand Concourse, Bronx NY

CERTIFICATE OF NOTICE.

I, do hereby certify that to-day I sent to the supreme Courte of Puerto Rico, San Juan, Puerto Rico, ten copies of the petition and appendixs; to the Hon. Judge of the Superior Court of Mayaguez, three copies; and three copies to Ildefonso Freyre, Mayaguez attorney for the plaintiffs.

Mayaguez, June 5th, 1973.

Jose Sabater

Attorney for the petitioner

CERTIFICATE OF NOTICE.

I, hereby certify that today June 28th. 1973 it was delivered to Hon. Manuel J. Vera Mercado, Judge of the Superior Court of Puerto Rico, Section of Mayaguez; to Ildefonso Freyre, Esquire Attorney for respondents and to Walter L. Newsom Jr., Bank of Nova Scotia Building, San Juan, Puerto Rico, true copy of the precedent petition for writ of Certiorari and the appendix. At Mayaguez, Puerto Rico.

José Sabater

Jose Sabater, one of the attorneys for Petitioner.